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No. 91-1523

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, *et al.*,
Petitioners,
v.
SHANNON CARTER, BY and THROUGH HER FATHER and NEXT FRIEND, EMORY CARTER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICI CURIAE* OF THE NATIONAL ALLIANCE FOR THE MENTALLY ILL, THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AND THE MARYLAND DISABILITY LAW CENTER IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Are parents entitled to equitable reimbursement for temporarily placing their child in an appropriate, though not State-approved, private special education program while awaiting a decision on their complaint about their child's inappropriate publicly funded program?

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This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of the Court.

INTERESTS OF THE *AMICI*

The *Amici* are all organizations whose members or clients include children with disabilities and their families who have a direct and vital interest in the Court's decision in this case. The *Amici* have extensive experience working with school districts on behalf of families to ensure proper implementation of their rights under the special education laws.

The National Alliance for the Mentally Ill (NAMI) is a self-help organization of families of persons with mental illness, persons with mental illness themselves, and their friends. Composed of over one thousand local and state alliance groups all over the country, its goals are mutual support, education, and advocacy for persons with severe mental illness and their families. The NAMI Children and Adolescents Network (NAMI CAN) advocates for improved systems of care for children and adolescents with serious brain disorders or mental illnesses, including those with serious emotional disorders as defined by the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* NAMI CAN advocates for the many children with serious emotional disorders who do not have access to appropriate education and related services in their community public school systems.

The Bazelon Center For Mental Health Law (formerly the Mental Health Law Project) is an independent nonprofit organization that, for twenty years, has been devoted to the development of the law affecting people with mental illness and mental retardation. The Bazelon Center has written model laws, advocated for protective legislation, and participated either as counsel or *amicus curiae* in virtually every civil case concerning mental disability law that has come before this Court. The Bazelon Center submitted briefs as counsel for the plaintiff in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), concerning release of a non-dangerous patient in the absence of treatment; *Addington v. Texas*, 441 U.S. 418 (1979), concerning the standard for civil commitment of persons with mental illness; *Bowen v. City of New York*, 476 U.S. 467 (1986), concerning jurisdiction for class-wide challenges to Social Security Administration practices; and *Washington v. Harper*, 494 U.S. 210 (1990), concerning involuntary administration of medication to a prisoner. It has submitted briefs *amicus curiae* in many other disability law cases as well, including *Mills v.*

Rogers, 457 U.S. 291 (1982); *Parham v. J.L.*, 442 U.S. 584 (1979); *Pennhurst State School v. Halderman*, 465 U.S. 89 (1984); *Board of Education v. Rowley*, 458 U.S. 176 (1982); and *Zinermon v. Burch*, 494 U.S. 113 (1990).

The National Association of Protection and Advocacy Systems (NAPAS) represents Protection and Advocacy Systems established pursuant to Section 113 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6042, and the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§ 10801 *et seq.* All fifty-six states and territories of the United States have Protection and Advocacy Systems with the statutory mandate to protect and advocate for the rights of persons with developmental disabilities and persons identified as mentally ill. As part of their statutory mandate, Protection and Advocacy Systems represent numerous school-aged children in matters arising under the Individuals With Disabilities Education Act.

The Maryland Disability Law Center (MDLC) is the agency designated pursuant to the Developmentally Disabled Assistance Bill of Rights Act, 42 U.S.C. § 6042, and the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§ 10801 *et seq.*, to represent persons with developmental disabilities and persons identified as mentally ill in Maryland. During the 1992 fiscal year, MDLC provided legal assistance to over 300 school-aged children who experienced difficulty obtaining a free appropriate public education under the Individuals with Disabilities Education Act.

STATEMENT OF THE CASE

Amici incorporate by reference the Statement of the Case contained in Respondents' Brief.

ARGUMENT

I. FAMILIES NEED REIMBURSEMENT OF THE COSTS OF APPROPRIATE, THOUGH UNAPPROVED, PRIVATE SCHOOLS TO ENSURE MEANINGFUL ENFORCEMENT OF THE IDEA'S EQUITABLE REMEDY PROVISIONS.

The issue in this case is whether parents should be reimbursed for temporarily placing their child in an appropriate, though unapproved, private special education program while awaiting a decision on their complaint about their child's publicly-funded program.

In *Burlington Sch. Comm. v. Mass. Dept. of Educ.*, 471 U.S. 359 (1985), the Supreme Court laid out the analytical framework for resolving this issue. The Court began by recognizing the problems faced by families when they seek administrative and judicial review of a school district's proposed IEP: "Whereas in the present case review of a contested IEP takes years to run its course—years critical to the child's development—important practical questions arise concerning interim placement of the child and financial responsibility for that placement." *Burlington*, 471 U.S. at 361.

The Court answered those "practical questions" by holding that the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, does authorize reimbursement. In so holding, the Court stressed the dilemma faced by children and their parents when they seek administrative and judicial review of a school district's proposed IEP:

> A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement.

Burlington, 471 U.S. at 370.

The need to resolve this dilemma consistent with the primary purpose of the IDEA led the Court to require reimbursement as a broad equitable remedy authorized by 20 U.S.C. § 1415(e)(2). While the Court in *Burlington* did not specifically address the issue of reimbursement when the private school has not been approved by the State, the same practical considerations, the same family dilemma, and the same equitable factors require reimbursement of private school costs when the State has not approved the private school, as long as the court finds the private school program appropriate for the child.

Families seeking interim private programs while contesting a proposed IEP often find themselves in dire straits. Precious time is lost as they wade through the appeal process, and their child sits in an inappropriate classroom or in no classroom at all. In Shannon Carter's case, she "continue[d] to fall behind her classmates at an alarming rate." *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 159 (4th Cir. 1991). In *Alamo Heights Ind. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986), a child would have regressed substantially from not receiving any education if his mother had not unilaterally placed him in an unapproved program while challenging the school district's refusal to provide summer school. In *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1481 (9th Cir. 1992), as a result of an inappropriate IEP, a child "began to suffer from physical symptoms of stress, such as gastrointestinal pain and insomnia . . . [H]is mother worried that he was suicidal."

In all of these situations, a child's future is at stake and responsible parents must act quickly. Their rightful concern and priority is not whether the State has approved the private program, but whether that program can help their child now.

Many times, such as in the present case, no State approval list even exists to guide parents in looking for interim placements. States such as South Carolina grant approval on a case-by-case basis using technical criteria that "[p]arents cannot reasonably be expected to know" as a prerequisite to reimbursement. *Vacaville Unified Sch. Dist.*, 18 IDELR 1278, 1280 (Cal. Spec. Ed. Hrg. 1992). Without access to such information, parents can only be expected to know that the school district's proposed placement is inappropriate and that their own interim placement is appropriate. These are the only two prerequisites to reimbursement that this Court spelled out in *Burlington*, and these are the only two requirements that make sense in light of the equities involved in this case.

Even if a State maintains a list of approved schools, parents are often unaware of its existence. The school district possesses all the information about whether a private school has been State-approved. Because of the litigation posture of the case, the school district is not always forthcoming in sharing its knowledge with parents who have challenged its proposed placement. As the court noted in *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 567 (2d Cir. 1989):

> We find no indication in the record of any effort on the part of the School District to assist the Tuckers in any way in finding a mutually acceptable alternative to the proposed IEP. We find this troubling, as the School District was no freer than were the Tuckers to leave to the other party the responsibility of searching for an acceptable placement. It may be that having made its recommendation, the School District meant to leave the Tuckers alone with a "take it or leave it" crisis, namely deciding between the alternatives of accepting the proposed IEP or leaving their child at home without a placement. Such an "unfortunate" situation would constitute a "less than complete" safeguarding of John's rights under the EHA.[1]

Unfortunately, a school district may be tempted to present parents with such a "take it or leave it crisis" because the school district lacks the financial incentive to pay for an interim placement pending resolution of the case. As a result, the "parents may be left to their own devices in finding a school that provides the specialized educational environment necessary to educate their children." *Carter*, 950 F.2d at 164.

Often, a child's needs are so unique that there is simply nothing available among the private programs on the school district's list. Parents faced with this predicament have no choice but to temporarily place their child in an unapproved program. For example, in *Matthew S. v. Sobol*, 17 EHLR 575 (S.D. N.Y. 1991), parents unilaterally placed their child with behavioral, learning, and physical disabilities in an unapproved private school only after several private schools proposed by the public school district had rejected him. "Given the present circumstances, where an approved placement was unavailable to Matthew . . ., denial of reimbursement places the petitioner in the untenable position of choosing between providing no education for his son or personally paying for his placement. . ." *Matthew S.*, 17 EHLR at 577. While sympathizing with the parents' dilemma, the New York District Court felt bound by the Second Circuit decision in *Tucker* to deny reimbursement for the cost of the unapproved school. But see, EHLR 507:381 (1986), in which an Illinois state administrative appeal board or-

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[1] The court in *Tucker* stated that it was unable to consider these equitable factors because the law limited reimbursement only to State-approved schools. But as this Court stated in *Burlington*, 471 U.S. at 374, "equitable considerations are relevant in fashioning relief" under § 1415(e)(2).

dered a school district to reimburse parents for the costs of an unapproved private school where no approved school would accept their child because of his severe emotional and behavioral disabilities. The appeals panel held that the school district could not avoid its responsibility to provide the student a free appropriate education by contending that the private placement was not State-approved, while failing to identify an appropriate approved placement.

As another example, in *Alamo Heights*, when the school district refused to provide a summer program for her mentally and physically disabled son, his mother searched diligently for a private program that could meet his many needs. The only program she could find was located at a rehabilitation hospital. The Court of Appeals held that though the school district itself may not have been required to place the child in this program, it must nonetheless reimburse the mother to some extent for her unilateral interim placement: "Factors that the court may consider in determining whether full or partial reimbursement is in order would include the existence of other, perhaps more suitable, substitute placements, the effort expended by Mrs. G in securing alternative placements, and the general cooperative or uncooperative position of the School District itself." *Alamo Heights*, 790 F.2d at 1161.

Often, as in the present case, parents unilaterally place their child in an unapproved school only after the child has already tried and failed at various public and private programs provided by the school district. The parents then seek the help of outside educational and psychological experts, who evaluate their child and make appropriate placement recommendations. Uppermost in the minds of these parents is whether their experts' placement recommendation will help their child, not whether it has been State-approved. Having been let down by State-approved placements in the past, their primary concern

is an appropriate education for their child, not the formality of State approval. "Under such circumstances, it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides the appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." *Carter*, 950 F.2d at 164.

II. PETITIONERS' POLICY ARGUMENTS AGAINST REIMBURSEMENT ARE SPECULATIVE, HYPOTHETICAL, AND INVALID.

Petitioners attempt to scare the Court by speculating about the supposed policy implications of allowing reimbursement of the costs of unapproved schools. The Court in *Burlington* rejected many of these same purely hypothetical arguments; they are equally invalid in the present case.

Petitioners contend that reimbursement will create financial hardship by diverting scarce public funds to private schools. Nothing in the record remotely suggests that the right to reimbursement will increase the financial burden on school districts. There is no evidence that upholding the Fourth Circuit's opinion will create an onslaught of parents rushing to pull their children out of public schools. To the contrary, the Fourth Circuit's opinion as well as this Court's holding in *Burlington* place significant limits on the right to reimbursement that prevent any such onslaught.

The law does not allow parents to get reimbursed automatically every time they unilaterally place their child in private school. As this Court pointed out in *Burlington*, 471 U.S. at 373-374, "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by

the school officials was appropriate, the parents would be barred from obtaining reimbursement." See also *Carter*, 950 F.2d at 164, where the Court of Appeals stressed that these "substantial risks . . . function to ensure that our decision will not be a means through which parents can subvert the Act's emphasis on public education."

Numerous courts have applied the *Burlington* requirements to deny reimbursement. *See, e.g., Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48 (1st Cir. 1992); *Livingston v. DeSoto County Sch. Dist.*, 782 F.Supp. 1173 (N.D. Miss. 1992); *Doe v. Bd. of Educ. of Tullahoma City Schools*, 18 IDELR 1089 (E.D. Tenn. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 1122 (1991). These courts are careful to stress that even if the unilateral private placement is superior to an appropriate public placement, reimbursement will be denied; the IDEA requires an appropriate, though not necessarily the best, public placement. *See, e.g., Tullahoma City Schools*, 18 IDELR at 1092. The courts also note that even if a unilateral private placement is superior academically to a public placement, it still may be inferior in its ability to meet a child's mainstreaming needs. In such circumstances, reimbursement again will be denied. *See, e.g., Roland M.*, 910 F.2d at 991; *Dobrowolski*, 976 F.2d at 52.

Even when parents are able to establish their entitlement to reimbursement, the unapproved reimbursable program is often less expensive than an approved program that the school district otherwise would be obligated to reimburse. For example, in *Garland Ind. Sch. Dist. v. Wilks*, 657 F.Supp. 1163 (N.D. Tx. 1987), a mother who challenged a school district's refusal to provide a residential placement could not afford to unilaterally place her child in a private school pending resolution of her court challenge. Instead, she paid for after-school and summer services to supplement the insufficient day program offered by the school district. The court ordered

reimbursement of these supplemental services, which were clearly less expensive than tuition for a State-approved private residential school. *See also, Target Range*, 960 F.2d at 1482, where the Ninth Circuit Court of Appeals ordered reimbursement of the services of a private tutor, which cost less than the long list of State-approved services the parents sought in their legal challenge of the school district's IEP.

Regardless of the amount of costs associated with reimbursement, these costs impose no additional burden on a school district. As this Court pointed out in *Burlington*, 471 U.S. at 370-371, "reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Accord, Shirk v. District of Columbia*, 756 F.Supp. 31, 33-34 (D. D.C. 1991), where the court stressed the need to reimburse parents as a way to prevent unjust enrichment to the school district:

> If the Court were to allow DCPS to avoid payment because of its failure to evaluate Leslie as required, DCPS will have avoided its legal duty to pay for Leslie Shirk's 1989-1990 education. This would reward DCPS for failing to comply with the law and would shift the financial burden for educating a handicapped child from the government to the individual handicapped child's parents. DCPS' failure to comply with the law as well as basic fairness requires that DCPS reimburse plaintiffs . . .

Petitioners also contend that the ruling below would foster inappropriate private school placements.[2] Yet, even the court in *Tucker*, 873 F.2d at 564, n.1, readily recog-

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[2] While Petitioners now try to paint Trident Academy as inappropriate, they did "not dispute the district court's conclusion that Trident Academy provided Shannon with an appropriate education, which is a prerequisite to reimbursement under *Burlington*." *Carter*, 950 F.2d at 161, n.2. Indeed, South Carolina had approved and funded placement of three other children at Trident Academy. *Id.* at 159.

nized that "[a]n unapproved school is not necessarily an inferior school." Trident Academy and other perfectly appropriate private schools have not been State-approved only because the State does not maintain a list of approved schools. Many other excellent private schools decide on their own not to seek State approval to avoid the cumbersome bureaucratic requirements that go along with it. Other appropriate private schools are not on a State-approved list simply because the State has failed or refused to evaluate the schools. Still others have been approved by the State where they are located, but not by the State where the child resides. *See, e.g., East Longmeadow Public Schools*, 16 EHLR 395 (Mass. Adm. Hrg. 1989).

Petitioners see some inconsistency in the fact that a school district cannot place a child in an unapproved private school but parents can do so and get reimbursed. Yet a school district's formal permanent placement decision involves entirely different considerations than a parent's unilateral interim placement pending resolution of a legal challenge. Reimbursement in that limited context is an equitable remedy that should not be undermined by imposing inapplicable prerequisites. Thus, in *Burlington*, the Court saw no inconsistency in requiring the school district to abide by the stay-put requirements of 20 U.S.C. § 1415(e)(3), but not imposing such a requirement on parents. "If the provision is interpreted to cut off parental rights to reimbursement, the principal purpose of the Act will in many cases be defeated in the same way as if reimbursement were never available." *Burlington*, 471 U.S. at 372.

Petitioners also contend that the decision below is incompatible with the IDEA's goal of fostering consultation and cooperation between parents and educators in developing a child's IEP. This is yet another argument rejected by the Court in *Burlington*. While cooperation and consultation are laudable goals, the Court in *Burlington*, 471 U.S. at 372, recognized that there are times in the administrative and judicial process when it would

be fruitless for parents to seek official approval of their interim placements.

Moreover, the mere fact that parents have placed their child in an unapproved school pending resolution of their legal challenge to the school district's actions does not constitute a lack of cooperation or consultation. In fact, in the present case, before concluding that they had no choice but to place Shannon at Trident Academy, the Carters tried unsuccessfully to work with the school district. *Carter*, 950 F.2d at 157-158. If the parents in some other case are uncooperative, the equitable considerations recognized by the Court in *Burlington* might bar them from getting reimbursement. *See, e.g., Garland*, 657 F.Supp. at 1167, where the court denied reimbursement for a unilateral placement made by a parent before she even notified the school district that she was dissatisfied with her child's IEP.

All of the concerns raised by Petitioners can be addressed by adopting such a case-by-case balancing-of-equities approach. The right to reimbursement derives from the "broad grant of equitable power" contained in 20 U.S.C. § 1415(e)(2). *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 919 (1st Cir. 1983). While declining to enumerate "the specific equitable factors . . . for granting relief," this Court in *Burlington*, 471 U.S. at 374, noted that "equitable considerations are relevant in fashioning relief."

Subsequent appellate and district court decisions have adopted this case-by-case balancing-of-equities approach in determining whether, and to what extent, parents should be reimbursed for the costs of unapproved schools. These courts have weighed the following factors:

1. What alternatives were actually available;
2. The parties' general cooperativeness;
3. The extent of parental compliance with the special education laws pending resolution of their legal challenge;

4. The reasonableness of the parties' positions;
5. Bad faith by either party; and
6. Whether the parents first tried to cooperate with the school district in finding an appropriate placement before filing their appeal.

Alamo Heights, 790 F.2d at 1161; *Carrington v. Comm'ner of Educ.*, 404 Mass. 290, 535 N.E. 2d 212 (1989); *Burlington*, 736 F.2d 773, 801 (1st Cir. 1984). See also, *Tucker*, 873 F.2d at 567. This case-by-case approach, not a blanket rule that arbitrarily denies reimbursement of all unapproved schools, no matter how appropriate, would give substance to the equitable remedies provided by 20 U.S.C. § 1415(e)(2).

As this Court recognized in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982), there is no single test for determining whether a child with disabilities is receiving a free appropriate education. *Accord, Garland*, 657 F. Supp. at 1166. In the limited situation posed by reimbursement cases, parents should not be restricted to the single litmus test of State approval in their search for an appropriate interim education for their child.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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